Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

# 91-920

No.___

IN THE

## Supreme Court Of The United States

OCTOBER TERM, 1991

JANET L. ROWLAND
and DONALD E. ROWLAND

*Petitioners,*

v.

DONALD A. PATTERSON, M.D,
TOM J. ALTIZER, M.D.,
MICHAEL A. WINSLOW, M.D.,
ROBERT K. HOBBS, M.D.
and ROBERT J. CIRINCIONE

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARVIN ELLIN*
LaVONNA L. VICE
ELLIN & BAKER
1101 St. Paul Street
Baltimore, Maryland 21202
Telephone: (301) 727-1787
Attorneys for Petitioners

*Counsel of Record

December 4, 1991

Balmar Legal Publishing Divison, Washington, D.C. 20005 (202) 659-3610

## QUESTIONS PRESENTED

1. Pursuant to Federal Rule of Civil Procedure 56(c), can a court usurp the function of the jury and find as a matter of law that there are no genuine issues of material facts when the inferences to be drawn from those facts depend upon application of the "reasonable person" standard?

2. When a state's highest court has ruled on a point of law, may a federal court rely upon that state's intermediate appellate court decision on the same point of law?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTIONAL STATEMENT | 2 |
| STATUTORY PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. THIS COURT SHOULD ESTABLISH A CLEAR AND STRINGENT TEST FOR DETERMINING WHETHER SUMMARY JUDGMENT SHOULD BE GRANTED IN CASES INVOLVING THE APPLICATION OF A "REASONABLE PERSON" STANDARD | 6 |
| II. THE FEDERAL COURT MUST RELY UPON A STATE'S HIGHEST COURT RULING ON A POINT OF LAW AND NOT UPON AN INTERMEDIATE COURT RULING THAT IS IN CONFLICT WITH THE HIGHEST COURT'S RULING. | 13 |
| CONCLUSION | 16 |

## TABLE OF AUTHORITIES


| CASES | PAGES |
|---|---|
| *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420 (10th Cir. 1991) | 12 |
| *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967) | 12 |
| *Baysinger v. Schmid Products Co.*, 307 Md. 361, 514 A.2d 1 (1986) | 5, 6, 14 |
| *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) | 11 |
| *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986) | 7 |
| *Cook v. Baker Equipment Engineering Co. Inc.*, 582 F.2d 862 (4th Cir. 1978) | 8 |
| *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988) | 11 |
| *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) | 13, 15 |
| *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990) | 10, 11 |
| *Kedzierski v. Kedzierski*, 899 F.2d 446 (7th Cir. 1990) | 11 |
| *Lutheran Hospital v. Levy*, 60 Md.App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985) | 6, 13, 14 |
| *Mathews v. Ashland Chemical, Inc.*, 703 F.2d 921 (5th Cir. 1983) | 11 |
| *Milwaukee Area Vo. Tech. v. U.S. Steel Corp.*, 847 F.2d 435 (7th Cir. 1988) | 11 |
| *Pennwalt Corp. v. Nasios*, 314 Md. 433, 550 A.2d 1155 (1988) | 5, 15 |

| CASES | PAGES |
|---|---|
| *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951) | 8 |
| *Rowland v. Patterson*, 852 F.2d 108 (4th Cir. 1988), *rev'd en banc*, 882 F.2d 97 (1989) | 5 |
| *Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567 (11th Cir. 1990) | 12 |
| *Smith v. States Marine International, Inc.*, 864 F.2d 410 (5th Cir. 1989) | 10, 11 |
| *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) | 7 |
| *United States v. Kubrick*, 444 U.S. 111 (1979) | 5 |
| **STATUTES** | |
| Fed. R. Civ. P. 56(c) | 6, 7 |
| Md. Cts. & Jud. Proc. Code Ann. § 3-2A-01 *et. seq.* | 4 |
| Md. Cts. & Jud. Proc. Code Ann. § 5-109 | 5 |
| 28 U.S.C. § 1254(1) | 2 |
| **OTHER AUTHORITIES** | |
| 10 C. Wright & Miller, Federal Practice and Procedure: Civil § 2729 (1978) | 7 |
| *When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner*, 80 A.L.R.2d 368 | 5 |

No.

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1991

JANET L. ROWLAND and DONALD E. ROWLAND
*Petitioners,*

v.

DONALD A. PATTERSON, M.D,
TOM J. ALTIZER, M.D.,
MICHAEL A. WINSLOW, M.D.,
ROBERT K. HOBBS, M.D.
and ROBERT J. CIRINCIONE
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Janet L. Rowland and Donald E. Rowland, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 15, 1991.

## OPINIONS BELOW

The opinions of the Court of Appeals for the Fourth Circuit (Appendix A) and the district court (Appendix B) which form the basis of this petition are unreported. The opinion of the Health Claims Arbitration Office of Maryland (Appendix C) is unreported. The Maryland circuit court opinion of the Circuit Court for Washington County (Appendix D) is unreported. The

opinion of the Court of Appeals for the Fourth Circuit (Appendix E) affirming the district court's dismissal for lack of jurisdiction is reported at 852 F.2d 108. The opinion of the Court of Appeals for the Fourth Circuit sitting *en banc* (Appendix F) and reversing the district court's dismissal for lack of jurisdiction is reported at 882 F.2d 97. The opinion of the district court (Appendix G) dismissing Petitioners' claim for lack of jurisdiction is unreported.

## JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 15, 1991. Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on September 9, 1991 and this Petition for Writ of Certiorari was timely filed. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56(c), provides in pertinent part:

> *Motion and Proceedings Thereon.* The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

## STATEMENT OF THE CASE

For several months prior to May 24, 1982, Janet L. Rowland, then thirty-eight years of age, suffered from intermittent low back pain. She visited the Respondents in their office, submitted to a myelogram, and was advised that the pain and

numbness she was experiencing in her left leg was due to a "bulging disc." Mrs. Rowland was advised that surgery was required.

On June 3, 1982, Mrs. Rowland was operated on at Washington County General Hospital in Hagerstown, Maryland. Contrary to acceptable standards of care, the Respondent Patterson lacerated her right iliac artery and vena cava. Within a twenty four hour period following surgery, Mrs. Rowland submitted to two more emergency surgeries to save her life.

Following the repairs of the vascular trauma negligently inflicted by the Respondents, Mrs. Rowland's condition continued to deteriorate. By June 11, 1982, she was again operated on to remove a large hematoma and a portion of the vertebral body. Disc material was removed to relieve pressure on the nerve roots and prevent further deterioration of Mrs. Rowland's condition.

Mrs. Rowland was discharged from Washington County General Hospital on July 23, 1982 in a permanently disabled state. Her voluntary bladder and bowel function had been destroyed. She suffered from unremitting pain in the lower extremities and lower back.

At all times pertinent hereto, the Respondents advised Mrs. Rowland that her condition arose from the complexity of the surgery. She was never advised that the complications she suffered from were the result of negligently inflicted injuries to her iliac artery and vena cava. She was told her condition would improve. When Mrs. Rowland was discharged on July 23, 1982, she believed she had suffered from the natural complications of surgery.

Mrs. Rowland's complications were such that she was re-confined by Dr. Patterson at Washington County General Hospital on January 14, 1983 with an admitting diagnosis of

"chronic lumbar arachnoiditis." She was placed in traction and other treatments were attempted until Mrs. Rowland was discharged on January 14, 1983.

In the early part of 1983, a general practitioner recommended to Mrs. Rowland that she seek a second opinion as to the reason for her disability, pain, and complications. Thus, in March of 1983, she sought the opinion of a specialist, Dr. Thomas Ducker, at the University of Maryland Hospital in Baltimore, Maryland. She was admitted for various studies from March 13 to March 23, 1983.

During this time, it was suggested to the Petitioners for the first time, by Dr. Ducker, that Mrs. Rowland's complications were due to medical negligence. Prior to this point, the Petitioners in their earlier conversations in June of 1982 with the doctors at the Washington County General Hospital were told that the damage and complications suffered by Mrs. Rowland were a result of natural complications of surgery.

Subsequent to their visit to Dr. Ducker, Petitioners sought the advice of counsel and on July 16, 1985 filed a medical malpractice claim with the Health Claims Arbitration Office of the State of Maryland.[1]

On motion by the Respondents, the Panel Chairman granted summary judgment on May 6, 1987 stating that the statute of limitations had run on the Petitioners' claims. On June 15, 1987, the Petitioners filed a complaint in the United States District Court for the District of Maryland.[2]

---

[1] Maryland law requires that all medical malpractice claims be arbitrated as a pre-condition to filing in court. Md. Cts. & Jud. Proc. Code Ann. § 3-2A-01 *et. seq.* The filing of a claim in the Health Claims Arbitration Office is a filing for statute of limitation purposes. The arbitration panel is comprised of three persons, an attorney (Panel Chairman) a physician and a layperson. All matters of law are decided by the Panel Chairman individually.

[2] Jurisdiction was based on diversity of citizenship. At the time the complaint was filed Petitioners were citizens of West Virginia and Respondents were citizens of Maryland.

Respondents renewed their motion for summary judgment in the district court on the basis that the statute of limitations had run on Petitioners' claims. On July 16, 1990 the district court granted the motion.[3] On August 15, 1991 the Court of Appeals for the Fourth Circuit affirmed the district court and on September 9, 1991 denied the Rowlands' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

At issue, for statute of limitation purposes, was whether Mrs. Rowland was on notice of her claim prior to the running of the statute.[4] In Maryland, as in many other jurisdictions, such notice occurs when a reasonably prudent person in the same or similar circumstances either knew or should have known of possible wrongdoing. *Baysinger v. Schmid Products Co.*, 307 Md. 361, 514 A.2d 1 (1986).[5]

---

[3] Petitioners' complaint was originally dismissed on October 5, 1987 for lack of subject matter jurisdiction. On July 18, 1988 the Court of Appeals for the Fourth Circuit affirmed. *Rowland v. Patterson*, 852 F.2d 108 (4th Cir. 1988). However, the court, sitting *en banc* reversed the district court on August 10, 1989. *Rowland v. Patterson*, 882 F.2d 97 (4th Cir. 1989).

[4] Md. Cts. & Jud. Proc. Code Ann § 5-109 states that a claim for medical malpractice must be brought within three years from the date of discovery or five years from the date of the injury - whichever is less. It was not disputed that the Petitioners brought their action within the five year limitation.

[5] This is what is known as the "discovery rule." Any differences between the jurisdictions in applying the "discovery rule" usually involves the quantum of knowledge necessary to trigger the running of the statute of limitations. For example, in Maryland the statute does not begin to run until the plaintiff has knowledge that a duty was owed, that it was breached and that the injuries were a result thereof. *Pennwalt Corporation v. Nasios*, 314 Md. 433, 550 A.2d 1155 (1988). Whereas other jurisdictions may only require knowledge of injury and causation. *United States v. Kubrick*, 444 U.S. 111 (1979) (malpractice claim brought pursuant to the Federal Tort Claims Act). *See also, When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner*, 80 A.L.R.2d 368.

In the instant case both the district court and the court of appeals held as a matter of law that a reasonable person in Mrs. Rowland's situation would have undertaken further investigation more than three years prior to her commencing suit. In so deciding, both courts usurped the function of the jury and relied upon their own judgment as to what a reasonable person would do in the same situation as Mrs. Rowland. In support of their holdings, both courts relied on the intermediate appellate decision of *Lutheran Hospital v. Levy*, 60 Md.App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985) that was decided prior to a contrary decision by Maryland's highest court in *Baysinger v. Schmid Products co.*, 307 Md. 361, 514 A.2d 1 (1986).

Moreover, both courts relied upon the same intermediate appellate decision in support of their decision as to the quantum of knowledge required to put a person on notice of a claim. Instead of requiring that a person know all four elements of a malpractice claim i.e., duty, breach, causation and harm, both courts only require a finding that Mrs. Rowland was aware of her injuries and that they resulted from her surgery.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD ESTABLISH A CLEAR AND STRINGENT TEST FOR DETERMINING WHETHER SUMMARY JUDGMENT SHOULD BE GRANTED IN CASES INVOLVING THE APPLICATION OF A "REASONABLE PERSON" STANDARD.

This Court needs to establish a clear and stringent test for determining when summary judgment is appropriate in statute of limitation cases wherein the "reasonable person" standard is implicated. Currently, Rule 56(c) of the Federal Rules of Civil Procedure provide that summary judgment shall lie if "there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." In most cases the courts are confronted with whether or not there are any *conflicting* material facts or whether or not a party has established facts sufficient to get his case to a jury. *See*, e.g., *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). In such cases, once the undisputed facts are determined, it is relatively simple to apply the law to determine whether judgment should issue.

However, in many cases in which summary judgment is sought on the basis that an applicable statute of limitations has run, the facts themselves are not in dispute, but rather, the inferences to be drawn from those facts are disputed. This is particularly true in situations where application of a "discovery rule" is necessary for a final determination. Because application of the "discovery rule" necessarily involves judging the plaintiff's actions according to a "reasonable person" standard, summary judgment should rarely, if ever, be available. Indeed, this Court suggested as much in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, n.12 (1976)(citing 10 C. Wright & Miller, Federal Practice and Procedure: Civil § 2729 (1973)), wherein it was stated that the "jury's unique competence in applying the "reasonable man" standard is thought ordinarily to preclude summary judgment in negligence cases."

The need for this Court's guidance in this area cannot be overstated. Because the running of the statute of limitations is a defense to nearly every type of civil action and because many jurisdictions, including the federal, adopt some type of "discovery rule", the Court's granting of the writ in the instant case will resolve an important question as to what standard or test should be applied when summary judgment is sought and the "reasonable person" test is implicated.

Although all of the circuits, when confronted with the granting or denial of summary judgment in statute of limitation cases, rely on Rule 56(c) for initially determining whether there are any material facts in dispute, they are split as to what, if any,

standard should be applied when the facts themselves are not in dispute but rather the inferences that should be drawn when the "reasonable person" standard is implicated.

Thus, some circuits routinely grant or affirm summary judgment when the facts are not in dispute and simply find as a matter of law that a reasonable person would have been on notice of a possible claim at some point beyond the applicable statute of limitations. Other circuits recognize that whenever the inferences themselves are subject to a "reasonable person" standard, they are in and of themselves genuine issues of material fact precluding summary judgment.

An example of this can be found by comparing the instant case with admonitions of the Fourth Circuit in *Cook v. Baker Equipment Engineering Co., Inc.*, 582 F.2d 862, 865 (1978)(emphasis in original) wherein the court stated:

> In no other area of the law does the lay jury play a more *definitive* role than in a negligence case when it is required to determine whether an actor's conduct is prudent and reasonable under the given circumstances... The inferences to be drawn from the proofs turn on the degree of corroboration mixed with the overall skill of persuasion demonstrated by the respective adversaries... With this understanding, it should be readily perceived that a summary proceeding which denies the parties the right of trial by jury and which attempts to decide the case on abbreviated proof should rarely be used in negligence suits.

The court continued and quoting from *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951):

> It is only where it is *perfectly* clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other

> on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment...

*Id.*

Yet, in the instant case, the Fourth Circuit held that a reasonable person in the same or similar circumstances as Mrs. Rowland would have been on notice of a possible claim at a time outside the statute of limitations. This is despite the undisputed fact that Mrs. Rowland was assured that her injuries were the result of natural complications of surgery, despite the undisputed fact that Mrs. Rowland continued under the care of the negligent physician and despite the undisputed fact that Mrs. Rowland was still confined to the hospital at a point in time that the court held she was on notice of her claim.

In so holding the Fourth Circuit simply stated that "[W]hile the Rowlands obviously did not have the expertise of Dr. Ducker, they did have sufficient information by June 12, 1982 to cause a reasonable person to investigate further to see if malpractice had occurred." App. A, at p. 5-a. Thus, not only did the district court and the Fourth Circuit deny the Rowlands the right to have a jury decide what a "reasonable person" would have done in the same or similar circumstances, neither court acknowledged whether the inferences to be drawn from the undisputed facts in and of themselves create a genuine issue of material fact. Moreover, in the absence of any stated test or standard by which the courts measure the appropriateness of granting summary judgment when the "reasonable person" standard is implicated, it is unclear how the courts measured the Rowland's actions against that of a reasonable person.

In looking to the other circuits it is abundantly apparent that the lack of any standard for measuring a party's actions against that of a reasonable person has produced anomalous and inconsistent results. The most striking example of this is the Fifth

Circuit's decision in *Smith v. States Marine International, Inc.*, 864 F.2d 410 (5th Cir. 1989) and the Seventh Circuit's decision in *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990).

The undisputed facts in *Smith* revealed that the plaintiff, while working in the engine room of various ships, had been exposed to loud noises on a continuing basis. He suffered temporary hearing loss which returned after being away from the noise. In the mid-1970's the plaintiff began to notice problems with his hearing and despite pleading from his spouse and friends, did not seek medical attention until May 1986. It was not until February of 1987 that an action was filed against the employer.

The district court granted summary judgment in favor of the defendant on the basis that the plaintiff knew or had reasonable opportunity to discover his cause of action. In reversing, the Fifth Circuit noted that on the undisputed facts it would be up to the trier of fact to determine what *inferences* should be drawn from those facts and whether a reasonable person would have been on notice of a claim.

In *Fries* the undisputed facts revealed that the plaintiff, while working as a machinist, had been exposed to loud noises on a continuing basis. He suffered from a ringing in his ears which only subsided after being away from work for a period of time. As early as 1981 the plaintiff began to notice problems with his hearing but did not seek medical treatment until 1985 and did not file his action until 1987.

The district court granted the defendant's motion for summary judgment on the basis that the plaintiff knew or reasonably should have known of a possible claim as early as 1981. The Seventh Circuit agreed, stating that a reasonable person would have investigated the cause of his injury in 1981.

It could be argued that because these cases involve application of the "reasonable person" standard and they are so fact dependent, it would be difficult, if not impossible, to fashion a uniform standard for deciding summary judgment. However, as the decisions in *Smith* and *Fries*, *supra*, indicate, it is clear that the lack of a discernable standard produces anomalous results even when the facts are identical. Moreover, such an argument actually points out the need for a uniform standard which would allow most if not all such cases to be decided by a jury. It is precisely when the courts begin distinguishing the nuances of the fact patterns, to decide whether summary judgment is appropriate, that inconsistent results follow.

A further comparison of the Seventh Circuit's approach with that of the Fifth Circuit's indicates a discernable trend consistent with those court's rulings in *Smith* and *Fries*, *supra*. *See*, e.g., *Milwaukee Area Vo. Tech. v. U.S. Steel Corp.*, 847 F.2d 435 (7th Cir. 1988)(affirming summary judgment as to notice of claim); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)(same); *Kedzierski v. Kedzierski*, 899 F.2d 681 (7th Cir. 1990)(same); *Mathews v. Ashland Chemical, Inc.*, 703 F.2d 921 (5th Cir. 1983)(issues requiring determination of reasonableness of acts and conduct of parties precludes summary judgment).

Another example of how the circuits are inconsistently applying the "reasonable person" standard can be found in cases alleging securities fraud. In these type of cases the issue is whether a reasonably prudent investor in the same or similar circumstances as the party alleging the fraud would have been on notice as to possible fraud and undertaken further investigation prior to the running of the statute of limitations.

For example, in *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988), investors in a limited partnership brought a securities fraud action alleging that the partnership was a sham. In affirming the district court's denial

of summary judgment the Eleventh Circuit followed the Fifth Circuit's reasoning and held:

> Inevitably the factual issue of due diligence involves, to some extent at least, the state of mind of the person whose conduct is to be measured against this test and it is simply not feasible to resolve such an issue on motion for summary judgment.

*Id.* at 1509 (quoting *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1967).

In *Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567 (11th Cir. 1990), the Eleventh Circuit again affirmed the denial of summary judgment notwithstanding that the undisputed facts revealed that the plaintiffs had received information in the form of letters and newspaper articles which indicated that something was amiss concerning the price of certain stock. The court held that "a genuine issue of material fact remains regarding whether the February 1984 letter and the various Wall Street Journal articles would have put a reasonable person on notice of fraud and whether Smith exercised due diligence in determining whether he had been defrauded. Such questions are best resolved by the jury." *Id.* at 1572.

On the other hand, the Tenth Circuit, in *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420 (10th Cir. 1991), has followed the Seventh Circuit's lead by substituting its judgment as to what a reasonable person would do with that of the jury's.

In *Anixter*, the district court denied defendants' motion to dismiss on limitations ground and a jury returned a verdict in favor of the plaintiffs. The Tenth Circuit reversed and held that the plaintiffs' claim was time barred because reasonable investors in the same circumstances would have been on inquiry notice of their claims when they became aware of an action filed by the Securities and Exchange Commission (SEC) together with an article which appeared in the *Wall Street Journal*.

Thus, it is clear that the circuits are split as to when a case should proceed to a jury when the "reasonable person" standard is implicated. Although no clear test has emerged from any of the circuits, there is a discernable difference among the circuits as to the burden a litigant must bear to survive a motion for summary judgment.

Therefore, it is urged that this Court grant this Petition for Writ of Certiorari in order to establish a clear test for determining whether summary judgment should be granted in cases involving application of the "reasonable person" standard.

## II. THE FEDERAL COURT MUST RELY UPON A STATE'S HIGHEST COURT RULING ON A POINT OF LAW AND NOT UPON AN INTERMEDIATE COURT RULING THAT IS IN CONFLICT WITH THE HIGHEST COURT'S RULING.

This Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) mandates that federal courts sitting in diversity apply the law of the state in which the action arose. This court has also stated that the law of the state is that expressed by statute and by the state's *highest* court. *Id.* at 78. In the instant case the district court and the Court of Appeals for the Fourth Circuit ruled in contravention of this doctrine by not looking to Maryland's highest court for their decisions.

Both the district court and the Fourth Circuit relied upon an intermediate Maryland appellate court (Maryland Court of Special Appeals) decision for two points of law, both of which have been expressly overruled by Maryland's highest court (Maryland Court of Appeals), in granting summary judgment to the Respondents.

First, both courts relied on *Lutheran Hospital v. Levy*, 60 Md.App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985), for the proposition that summary judg-

ment is appropriate in cases involving whether a reasonable person would have been on notice of a possible claim. However, the plaintiff in *Levy* admitted in her testimony that she was aware of all the elements of her cause of action and indeed had engaged the services of an attorney to prosecute her claim. In reversing the trial court, the Maryland Court of Special Appeals held that the judge had incorrectly applied the law in that he extended the running of the statute of limitations to allow a reasonable time for investigation.

To the extent *Levy* might be interpreted for allowing a court to find as a matter of law that a reasonable person would have undertaken further investigation of a claim, it was expressly rejected by the Maryland Court of Appeals in *Baysinger v. Schmid Products Co.*, 307 Md. 361, 514 A.2d 1, 4 (1986)(citations omitted):

> We shall assume, without deciding, that there is no dispute of material, primary fact in the instant case. From the primary facts some tribunal must deduce when the plaintiffs were on notice. That ultimate fact is ordinarily a question for the trier of facts going to the merits. Whether or not the plaintiffs failure to discover his cause of action was due to failure on his part to use due diligence, or to the fact that defendant so concealed the wrong that plaintiff was unable to discover it by the exercise of due diligence, is ordinarily a question of fact for the jury.

Second, both courts again relied on *Levy*, *supra*, for the proposition that a party need only be on notice as to two of the necessary elements of a tort action i.e.; causation and harm. The district court held that "knowledge of an actionable claim is not necessary to trigger the running of the limitations period. Instead, all that is required is knowledge of the injury and its cause." App. B at pp. 5b-6b. The Fourth Circuit agreed with this analysis. App. A at p. 5-a.

However, this reasoning was expressly rejected by the Maryland Court of Appeals in *Pennwalt Corp. v. Nasios*, 314 Md. 433, 550 A.2d 1155 (1988). Interestingly, this case arose out of a question certified to the United States District Court for the District of Maryland. In *Pennwalt* the court held that:

> To bring a negligence action, a plaintiff must prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) an injury to the plaintiff; and (4) that injury was proximately caused by the defendant's breach of duty.... In our prior cases, discovery of elements (1) and (2) were not in question. We see no reason, however, to hold that a plaintiff who cannot discover injury or causation should be entitled to relief while a plaintiff who cannot discover breach of duty is left without a remedy. A plaintiff who cannot gain knowledge of a defendant's breach of duty is in the same position as one who cannot discover injury because both are "blamelessly ignorant" and cannot be said to have slept on their rights.

550 A.2d at 1165-1166.

Thus, both the district court and the Fourth Circuit ignored Maryland law in direct contravention of *Erie R. Co. v. Tompkins*, *supra*. Therefore, this Court should issue the writ in the instant case to rectify a glaring mistake and to ensure that the federal courts not only apply state law while sitting in diversity, but apply the law as enunciated by that state's highest court.

## CONCLUSION

Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

Marvin Ellin*
LaVonna L. Vice
Ellin & Baker
1101 St. Paul Street
Baltimore, Maryland 21202
Telephone: (301)727-1787

Attorneys for Petitioners

*(Counsel of Record)

# APPENDIX A

No. 90-1074

UNPUBLISHED

# United States Court Of Appeals

FOR THE FOURTH CIRCUIT

Janet L. Rowland; Donald E. Rowland,
*Plaintiffs-Appellants,*

v.

Donald A. Patterson, M.D.; Tom J. Altizer, M.D.;
Michael A. Winslow, M.D.; Robert K. Hobbs, M,D;
Robert J. Cirincione, M.D.,
*Defendants-Appellees.*

Appeal from the United States District
Court for the District of Maryland, at Baltimore
Norman P. Ramsey, District Judge,
(CA-87-1560-R)

Argued: March 4, 1991
Decided: August 15, 1991

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BRITT, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished opinion. Judge Phillips wrote the opinion, in which Judge Murnaghan and Judge Britt joined.

## OPINION

PHILLIPS, Circuit Judge:

Janet and Donald Rowland appeal the district court's dismissal by summary judgment of their medical malpractice action on the ground that it was barred by the statute of limitations.

The Rowlands principally contend that the district court erred in determining the date on which their claims against the defendants accrued. We disagree and affirm.

## I

In May 1982, Janet Rowland sought treatment from Dr. Donald Patterson for a back injury she had sustained in a car accident. Dr. Patterson recommended surgery, and told Mrs. Rowland that following surgery she would be out of the hospital within two weeks and would be able to return to work in six weeks. On June 3, 1982, Mrs. Rowland underwent back surgery at the Washington County Hospital. Dr. Patterson performed this surgery, during the course of which Mrs. Rowland's right iliac artery and vena cava were lacerated.

Because of the lacerations, Mrs. Rowland was taken back to the operating room for an arteriogram the next morning. The arteriogram indicated that Mrs. Rowland had to undergo emergency surgery to repair the damaged blood vessel. Dr. Su, a vascular surgeon, performed this surgery on June 5, 1982. After the procedure, Dr. Su told Mr. Rowland that his wife had almost died, and that her worsened condition after the back surgery was caused by Dr. Pattersons' puncturing of the vena cava. J.A. at 454-56. Mrs. Rowland also learned at that time of Dr. Patterson's puncturing of the vena cava. J.A. at 325-26.

After Dr. Su's surgery, Mrs. Rowland remained in bad condition—paralyzed from her waist down. Sometime before June 11, 1982, she therefore consulted Dr. Carey, a neurosurgeon. Dr. Carey told her that further surgery was needed, indicating that her vena cava had been cut during Dr. Patterson's surgery. By Mrs. Rowland's admission, therefore, she knew at the time she consulted with Dr. Carey, some time before June 11, 1982, that something had gone wrong during Dr. Patterson's surgery. J.A. at 331 (deposition testimony). On June 11, 1982, Dr. Carey performed the surgery. After that procedure, Mrs.

Rowland still felt numb from her waist down. Her condition did not begin to improve until she started physical therapy.

Mrs. Rowland was discharged from the hospital on July 23, 1982, seven weeks after Dr. Patterson's initial surgery. At that point, her condition remained poor, as she had no feeling from her waist to her feet. She also had to take medication to control her bladder and her bowels. Because of her medical problems, Mrs. Rowland could not return to work.

In March 1983, following the advice of a general practitioner, Mrs. Rowland sought the opinion of Dr. Ducker at the University of Maryland hospital. After studying Mrs. Rowland's condition, Dr. Ducker concluded that Mrs. Rowland suffered from multiple lower nerve dysfunctions caused by the injuries she sustained during Dr. Patterson's surgery. Dr. Ducker also told the Rowlands that Mrs. Rowland's complications were caused by medical malpractice, and he suggested a lawsuit against Dr. Patterson. The Rowlands did decide to file suit, but waited until July 16, 1985 to do so. At that time, they sued Dr. Patterson and various other members of the Washington County Hospital staff as of the date of Pattersons's surgery, claiming personal injury and loss of consortium.

After discovery, the district court granted the defendants' motion for summary judgment, concluding that as a matter of law the action was time-barred. Specifically, the court held that under Maryland law, controlling in this diversity action, the Rowlands' malpractice claims accrued no later than June 12, 1982, following Dr. Carey's surgery, and was barred by Maryland's three-year medical malpractice "discovery" statute.

This appeal followed.

## II

Under Md. Cts. & Jud. Proc. Code Ann. § 5-109(a).

[a]n action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider...shall be filed within the earlier of: (1) five years of the time the injury was committed; or (2) three years of the date the injury was discovered.

It is undisputed that in this case § 5-109(2), the three years from date of discovery statute of limitations applies, as the shorter of the two limits. The questions are (1) when, as a matter of Maryland law, is discovery deemed to have occurred, hence the claim for medical malpractice to have accrued?; and (2) when, under the proper discovery rule, did discovery, hence accrual, occur here?

Under Maryland law, discovery occurs when the claimant first has either actual knowledge of the wrong or sufficient information to cause a reasonable person to investigate the possibility of wrong, in which case the person is charged with knowledge of all the facts that would have been discovered by a reasonably diligent investigation. See *Poffenberger v. Risser*, 431 A.2d 677, 680-81 (Md. 1981) ("the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong."); *Lutheran Hospital v. Levy*, 482 A.2d 23, 29 (Md. App. 1984) ("The crucial date is the date the claimant is put upon inquiry, not the date an expert concludes there has been malpractice.").

Applying these discovery principles, the district court concluded that on the undisputed facts of record, the Rowlands were on inquiry notice by the time Mrs. Rowland discussed her condition with Dr. Carey following his surgery on June 11, 1982. The district court summarized the Rowlands' knowledge as of that time as follows:

In addition to experiencing the harmful effects of Dr. Patterson's surgery, both plaintiffs were provided an explanation for their unanticipated difficulties. Dr. Su explained to Donald [Mr. Rowland] that Janet's [Mrs. Rowland] worsened condition was the result of damage to the vena cava, which had been inadvertently lacerated during Dr. Patterson's surgery. Dr. Carey confirmed Dr. Su's findings to Janet during his consultations with her following the June 11, 1982, surgery. Thus, by mid June at the latest, the Rowlands knew the following: Janet's surgery had gone badly; she required three additional procedures to correct the errors of Dr. Pattersons' initial surgery; and they were both told that an unusual event, laceration of the vena cava, had caused her problem.

Rowland v. Patterson, Civil Action No. R-87-1560, slip op. at 8 (D. Md. July 16, 1990).

The Rowlands contend that this conclusion was not warranted as a matter of law on the summary judgment record, that there was evidence from which a trier of fact could have found instead that discovery only occurred when Dr. Ducker first directly suggested Dr. Pattersons's fault in March of 1983. As the district court correctly pointed out, however, Dr. Ducker did not provide the Rowlands with any new facts – his conclusion that malpractice had occurred was based on information the Rowlands already had available to them. While the Rowlands obviously did not have the expertise of Dr. Ducker, they did have sufficient information by June 12, 1982 to cause a reasonable person to investigate further to see if malpractice had occurred. The district court therefore do not err in concluding that discovery, for purposes of the statute of limitations, occurred no later than June 12, 1982.

In a fall-back position, the Rowlands argue that the Maryland continuous treatment doctrine tolls the statute of limitations. In Maryland, however, the old common law continuous treatment rule has been held not to survive the discovery

rule of § 5-109(2), which controls here. *Hill v. Fitzgerald*, 501 A.2d 27, 32 (Md. 1985) ("provisions of § 5-109... are plainly inconsistent with the survival of the continuing treatment rule").

The Rowlands argue that even if we affirm the district court's grant of summary judgment as to malpractice claims against Dr. Patterson based on his initial surgery, we should find that they have alleged "separate and independent acts of negligence that occurred up to and including January 14, 1983" that accordingly were not time-barred. Appellant's Br. at 21, citing *Jones v. Speed*, 577 A.2d 64 (1990). In *Jones*, the Maryland Court of Appeals remanded to permit the plaintiffs to amend their complaint so as to allege acts within the limitations period as discrete claims despite their discovery of earlier acts which were time-barred by the discovery rule. The original *Jones* complaint contained sixteen counts, each alleging that by a separate act Dr. Speed was negligent in failing to properly diagnose Mrs. Jones' condition, and a seventeenth count alleging loss of consortium. Although the first nine counts, which described Mrs. Jones' first nine visits with Dr. Speed, clearly were barred even if considered as separate "claims," by the five-year statute of limitations, the later counts, if so considered, were within the statutory period. Over Dr. Speed's objections, the appellate court affirmed dismissal of only the first nine counts and remanded to allow the Joneses to amend to specifically allege the later acts within the limitations period as one separate, discrete claim of malpractice.

In the present case, the Rowlands refer us to paragraphs 21 and 22 of their Statement in Support of Claim. J.A. at 543. These paragraphs read as follows:

21. In support of the Claimant's contention that she had not been informed by the Defendant Patterson that he had inflicted injury to her vascular system and had further ignored cauda equina compression which had been permitted to exist in the postsurgical period is the fact that she permitted the Defendant

Patterson to reconfine her at the Washington County Hospital on January 14, 1983. She had an admitting diagnosis of "chronic lumbar arachnoiditis."

22. In spite of the fact that the Defendant Patterson knew or by the exercise of due care was charged with such knowledge that the Claimant's disability and pain was from permanently injured nerve roots which arose from the surgery of June 3, 1982 and his failure to promptly recognize and decompress the cauda equina immediately following manifestation of the paralysis, he nonetheless ordered traction for her. The claimant remained confined by these defendants until January 26, 1983, at which time she was discharged in essentially the same condition as she was upon her admission on January 14, 1983.

J.A. at 543. These paragraphs also appear as paragraphs 26 and 27 of Count I of the Rowlands' complaint. J.A. at 13. The Rowlands argue that, as in *Jones v. Speed*, these alleged acts of negligence occurring within the three-year limitation period should not be held time-barred on summary judgment.

Aside from the fact that this theory seems not to have been advanced in the district court, the allegations relied upon by the Rowlands do not, as did those of the *Jones* plaintiffs, arguably constitute separate discrete acts of negligence giving rise to separate claims. The first is simply an argumentative factual assertion designed to demonstrate original ignorance (non-discovery) of the injury. The second merely describes an intermediate course of treatment which is not alleged to have caused any separate, discrete injury.

By contrast, the *Jones* plaintiffs had alleged, and offered affidavit support for the allegation, that each of successive, separate treatments provided by their doctor had constituted the negligent infliction of distinct injury.

We are therefore not persuaded to take the course here that the Maryland appellate court thought warranted in *Jones v. Speed* in the interest of justice.

AFFIRMED

/s/ Norman P. Ramsey

Norman P. Ramsey
United States District Judge

# APPENDIX B

**CIVIL ACTION NO. R-87-1560**

IN THE

# United States District Court

FOR THE DISTRICT OF MARYLAND

JANET L. ROWLAND, ET AL

*Plaintiffs*

v.

DONALD A. PATTERSON, M.D., ET AL.

*Defendants*

## MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case are two sets of motions. Defendant Robert J. Cirincione, M.D., has filed a motion to dismiss or for summary judgment, or in the alternative, for more definite statement. Defendants Donald A. Patterson, M.D., Robert J. Hobbs, M.D., Michael A. Winslow, M.D., and Tom J. Altizer, M.D., have jointly moved for summary judgment. The plaintiffs have filed oppositions to both sets of motions, and counsel for Dr. Cirincione and Dr. Patterson have informed the Court that they do not wish to file replies to the Rowlands' oppositions. Finding no hearing necessary, the Court is now prepared to rule without need for a hearing. Local Rule 105.6 (D. Md. 1989). For the reasons set forth below, the motions for summary judgment will be granted.

### I. Background

Plaintiffs, Janet Rowland ("Janet") and her husband ("Donald"), bring this action seeking compensation for injuries resulting from a back operation performed on Janet at the Washington County Hospital. The defendants named in the Complaint were all members of the hospital's medical staff on

the date of the surgery. The action is brought under the tort theories of medical malpractice and *respondent superior*. For the most part, the facts surrounding the Janet's injuries are undisputed.[1]

In May 1982, Janet sought treatment from Dr. Patterson for injuries sustained in an automobile accident. She complained of pain in her lower back and hip, as well as numbness in her leg. After an examination, Dr. Patterson advised Janet that she required surgery and indicated that after the operation, she would be released from the hospital within two weeks and be able to return to work within six weeks. Based on the pre-operative discussions with the defendant, Donald understood that the purpose of the operation was to alleviate his wife's pain and, therefore, anticipated that her condition would improve following the surgery.

The alleged negligent surgery was performed by Dr. Patterson on June 3, 1982. The following morning Donald learned that his wife was being rushed back into the operating room for an arteriogram procedure, which was to be performed by another physician. Donald was instructed by the medical staff to leave the hospital and wait at home for further information. Later that day Dr. Su telephoned the plaintiff and explained to him that Janet's life was in danger and, as a result, surgery was required.

Dr. Su performed the operation on June 5, 1982. After the surgery, Dr. Su informed Donald that Janet's worsened condition, which included lower body paralysis, was the result of complications which arose during Dr. Patterson's surgery. Dr. Su further explained that during the back surgery, a major blood vessel, the vena cava, had inadvertently been punctured twice. Janet's condition continued to deteriorate. Dr. Carey, a neurosurgeon, examined the plaintiff and determined that

---

[1] To the extent there are any facts in dispute, the Court must, for the purspose of this ruling, view the facts in a light most favorable to the plaintiffs.

another operation was necessary to repair the damage to Janet's lower back. After performing the operation on June 11, Dr. Carey explained to Janet that her worsened health was the result of damage to the vena cava, which had been cut during Dr. Patterson's surgery.

Janet was finally discharged from the hospital on July 23, 1982, seven weeks after her initial surgery. At that time, she experienced severe pain and discomfort and had little control over her lower body. Moreover, Janet was unable to walk without assistance and was placed on medication to regulate her bowel and bladder functions. Due to her weakened state and poor health, Janet was unable to return to her employment as a nurse's aide.

In March of 1983, Janet was examined by Dr. Ducker at the University of Maryland Hospital. Dr. Ducker studied Janet's medical records and tested her lower body reflexes. He then explained to the Rowlands that Dr. Patterson's surgical procedure was relatively simple and suggested that negligence may have taken place since these type of health complications should not have resulted from the surgery.

The Rowlands however, waited until July 16, 1985, to file suit pursuant to the Maryland Health Care Malpractice Claims Act. Md. Cts. & Jud. Proc. Code Ann. § 3-2A-01 *et seq.* (Repl. Vol. 1989). The defendants moved for summary judgment, claiming that the action was barred because the statute of limitations had run. The arbitration chairman granted the defendants' motion and the plaintiffs subsequently filed suit in this Court. The defendants once again move for summary judgment.

## II. Standards for Summary Judgment

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure serves the important purpose of "conserv[ing] judicial time and energy by avoiding unnecessary trial and by

providing a speedy and efficient summary disposition" of litigation in which the plaintiff fails to make some minimal showing that the defendant may be liable on the claims alleged. *Bland v. Norfolk & S.R.*, 406 F.2d 863, 866 (4th Cir. 1969).

The applicable standards for analyzing a motion for summary judgment under Rule 56 are well-established. The defendant seeking summary judgment bears the burden of showing the absence of any genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining if the defendant has met this burden, the Court must consider whether, when assessing the evidence in light most favorable to the plaintiff, a "fair-minded jury could return a verdict for the plaintiff . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Pulliam Inv. Co., Inc. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987). Nevertheless, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. *See also Barwick v. Celotex Corp.*, 736 F2d 946, 958-59 (4th Cir. 1984). The plaintiff must identify for the Court some dispute of fact that is material to the legal issues presented in the case in order to successfully oppose a motion for summary judgment. "The plain language of Rule 56(b) mandates the entry of summary judgment, after an adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. It is against these standards that the Court shall review defendants' motion.

## III. Analysis

At common law, limitations against a cause of action commenced upon occurrence of the wrongful act. However, an exception was recognized for medical malpractice suits which

allowed the limitations period to begin when the wrong was discovered or when, through the exercise of diligent inquiry, it should have been discovered. *Hahn v. Claybrook*, 130 Md. 179, 100 A. 83 (1917). This common law rule has been codified by the Maryland General Assembly. The relevant statutory provision reads: "An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider . . . shall be filed within . . . [t]three years of the date of injury was discovered." Md. Cts. & Jud. Proc. Code Ann. § 5-109(a)(2) (Repl. Vol. 1989). There being an absence of legislative direction regarding what conduct constitutes "discovery," a brief overview of judicial treatment of the rule is warranted.

For the purpose of the discovery rule, actual, not constructive, knowledge of the wrong is required to start the running of the limitations period. *Poffenberger v. Risser*, 290 Md. 631, 431 A.2d 677 (1981); *Hahn*, 130 Md. at 186, 100 A. at 85. Actual knowledge may be either express or implied. Express knowledge is established by direct evidence, whereby notice of the wrong that caused the injury is directly communicated. *Poffenberger*, 431 A.2d at 680. *See Baltimore v. Whittington*, 78 Md. 231, 235-236, 27 A. 984, 985 (1893). Implied notice, in contrast, is inferred from circumstantial evidence. Such knowledge is established when the party to be charged becomes aware of circumstances which, through the exercise of diligent investigation, would lead him to acquire knowledge of the wrong that caused the injury. *Poffenberger*, *supra*.

Here, the Rowlands contend that the action did not accrue until March 1983, when they were told by Dr. Ducker that malpractice may have occurred. According to the rule, however, knowledge of an actionable claim is not necessary to trigger the running of the limitations period. *Lutheran Hospital v. Levy*, 60 Md. App. 227, 240, 482 A.2d 23, 29 (1984). *See Jones v. Suger*, 18 Md. App. 99, 105 & n.3, 305 A.2d 219, 223 & n.3 (1973).

Instead, all that is required is knowledge of the injury and its cause. In medical malpractice suits, the injury is often discovered long after the negligent conduct was performed but prior to the time the party knows that a cause of action may lie against the medical practitioner. As a result, a plaintiff's statute of limitations may begin to run before that plaintiff becomes aware that he has an actionable claim. Nevertheless, § 5-109(a)(2) demands that actions must be filed within three years of the time the plaintiff acquires knowledge, either express or implied, of the nexus between the alleged wrong and the injury. *Hill v. Fitzgerald*, 304 Md. 689, 699-700, 501 A.2d 27, 31-31 (1985). Applying these concepts to the case at bar, it is clear that the Rowlands had acquired sufficient knowledge of Janet's injury, as of June 12, 1982, for the limitations period to be triggered.

Based on their pre-operative discussions with Dr. Patterson, the Rowlands had certain basic expectations of the effects which would result from the back surgery. However, when Janet awoke from the surgery, she had lost control of her lower body and experienced severe pain and discomfort. In the weeks following the surgery, Janet experienced unremitting physical pain, of which Donald was well aware. Furthermore, in an attempt to ameliorate the damage, Janet underwent three additional surgical procedures. As a result, Janet remained in the hospital four weeks longer than had originally been expected.

In addition to experiencing the harmful effects of Dr. Patterson's surgery, both plaintiffs were provided an explanation for their unanticipated difficulties. Dr. Su explained to Donald that Janet's worsened condition was the result of damage to the vena cava, which had been inadvertently lacerated during Dr. Patterson's surgery. Dr. Carey confirmed Dr. Su's findings to Janet during his consultations with her following the June 11, 1982, surgery. Thus, by mid June at the latest, the Rowlands knew the following: Janet's surgery had gone badly; she re-

quired three additional procedures to correct the errors of Dr. Patterson's initial surgery; and they were both told that an unusual event, laceration of the vena cava, had caused her problem.

The basic rationale underlying the discovery rule is that it is unfair to bar recovery for an injury that a reasonably prudent person would be unable to discover. *Harig v. Johns-Manville Products*, 284 Md. 70, 81-83, 394 A.2d 299, 305-306 (1978). Therefore, the cause of action accrues only after the party to be charged has actual knowledge that "something wrong had been done". *Lutheran*, 60 Md. App. at 236, 482 A.2d at 27.

The Rowland's contend that they did not discover the injury until Dr. Ducker offered his opinion on March 3, 1983, that a possible legal claim existed; Dr. Ducker's opinion, however, was based entirely on facts already known to the plaintiffs. It is well established, that an action under the discovery rule does not accrue at the time the party receives in hand expert advise that malpractice may have occurred; rather, the clock begins to run once the party has knowledge of those facts which serve as the basis for an actionable claim. *Id.* at 239-240, 482 A.2d at 29. For the plaintiffs, this occurred when Dr. Su and Dr. Carey informed Donald and Janet of the underlying cause of the medical problems.

As a result, the discovery rule dictates that the plaintiffs were under a duty, as of June 12, 982, to investigate further and are, therefore, charged as of that date with notice of all facts that such an investigation would have disclosed, *Poffenberger*, 290 Md. at 637, 431 A.2d at 681, including Dr. Ducker's opinion that malpractice may have taken place. For the forgoing reasons, the Court concludes that the limitations period expired on June 12, 1985. Since this suit was not filed until July 16, 1985, the defendants are entitled to summary judgment.

Accordingly, it is this *16th* day of July, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motions for summary judgment are GRANTED; and

2. That the Clerk of the Court shall mail a copy of this Memorandum and Order to all counsel of record.

/s/Norman P. Ramsey

Norman P. Ramsey
United States District Judge

# APPENDIX C

**HCA NO. 85-376**

BEFORE THE

**HEALTH CLAIMS ARBITRATION OFFICE OF MARYLAND**

JANET L. ROWLAND and DONALD E. ROWLAND
*Claimants*

Vs.

DONALD A. PATTERSON, M.D., *et al.*
*Health Care Providers*

## OPINION AND ORDER

All Defendants in the above captioned matter have moved for summary judgment in their favor based upon two grounds: a release of the original tortfeasors by the Claimant bars this action against subsequent tortfeasors (the Defendants); and, the claim is barred for failure to file within three years of the date when the injury was discovered.

The first ground can be disposed of summarily. Based on two recently filed cases and because there are also genuine disputes of fact surrounding the execution of the proffered release, summary judgment is not appropriate at this state of the proceedings. *Morgan v. Cohen* No. 53 in the Court of appeals of Maryland, filed April 7, 1987, and *Hovermill v. Cohen* No. 54 in the court of Appeals of Maryland, filed April 7, 1987.

The second ground presents a greater problem. It is conceded that the limitation clock begins to run when the Plaintiff has an awareness implied from knowledge of circumstances which ought to put a person of ordinary prudence on inquiry, thus charging that person with notice of all facts which such an investigation would, in all probability, have disclosed had it been properly pursued.

The Defendant's memorandum in support of Motion for Summary Judgment contains a lengthy and impressive list of circumstances and facts known to the Claimants at the time of Dr. Carey's surgery, June 11, 1982, or shortly thereafter. It is sufficient to merely summarize the Claimants' knowledge as of that time. The Claimants expected the operation to ease the pain of a prior medical problem; they expected Mrs. Rowland to be discharged routinely from the hospital after surgery; Mrs. Rowland nearly died from the first operation; something had gone wrong in the first surgery, specifically, her vena cava had been cut in two places; she had to undergo two emergency operations; she was in great pain.

The knowledge of these circumstances as of June 12, 1982, or shortly thereafter, was sufficient to start the three year period during which the Claimants were under a duty to investigate further, and they are, therefore, charged with notice of all the facts that such an investigation would have disclosed.

The Claimants suggest two reasons why summary judgment should not be granted. They suggest that the panel chairman does not have authority to decide this issue under §3-2A-05(a)1 of the Health Care Malpractice Claim Subtitle: *O'Hara v. Kovens* 305 Md. 280, 503 A.2d 133 (1986). I believe that case requires summary judgment as a "matter of law" in those instances where there is no dispute of the facts, following ordinary principles governing summary judgment, and where, based on these facts, reasonable persons could only find that the Claimants were on notice more than three years prior to date this Claim was brought.

The Claimants also suggest that the continuing treatment rule, as articulated in *Waldman v. Rohrbaugh* 241 Md. 137, 215 A.2d 825 (1966), tolls the limitation period until the medical treatment is terminated. The problem is that the rule itself contains the caveat "...unless the patient sooner knew or reasonably should have known of the injury or harm, in which

case the statute would start with actual or constructive knowledge," thus bringing the issue back to principal question.

For reasons cited herein, it is therefore this *6th* day of May, 1987, hereby ORDERED:

1. The Health Care Providers' Motion for Summary Judgment, based on the release of the original tortfeasor, is denied.

2. The Health Care Providers' Motion for Summary Judgment, based on limitation is granted.

3. Judgment is hereby entered in favor of the Health Care Provider Donald A. Patterson, Robert K. Hobbs, Michael A. Winslow, Tom J. Altizer, and Robert J. Cirincione.

4. The costs, as assessed by the Director's Office, shall be paid one-half by the Claimants and one-half by the Defendant Health Care Providers.

/s/ Lucien T. Winegar
Lucien T. Winegar
Panel Chairman
15 North Court Street
Frederick, MD 21701
301/663-1234

# APPENDIX D

NO. 15,733 CIVIL

IN THE

Circuit Court

FOR WASHINGTON COUNTY

JANET L. ROWLAND AND DONALD E. ROWLAND

*Plaintiffs*

Vs.

DONALD A. PATTERSON, M.D.
TOM J. ALTIZER, M.D.
MICHAEL A. WINSLOW, M.D.
ROBERT K. HOBBS, M.D.
ROBERT J. CIRINCIONE, M.D.

*Defendants*

## MEMORANDUM OPINION

Aggrieved by an adverse ruling before the Health Claims Arbitration Board, the plaintiffs decided to challenge the decision of the Arbitrator by filing suit in the United States District Court for the District of Maryland on June 15, 1987. The procedural requirements as set forth in the Maryland statutes and as interpreted by the Maryland Court of Appeals in *Ott v. Kaiser-Georgetown Health Plan, Inc.,* 309 Md. 641 (1987), were fully complied with in a timely fashion.

Firstly, they filed a notice of rejection with the Health Claims Arbitration Board within 30 days, and secondly, they filed a notice of action to nullify and complaint in the United States District Court within 30 days. This was a conscious decision, an election on their part to proceed in the Federal Court. Had they chosen, they could have initiated their suit simultaneously in two jurisdictions by also proceeding in a timely fashion to file a complaint in state court in Washington

County, Maryland. They chose deliberately to proceed solely in the Federal Court and deliberately allowed the 30-day time limitations to expire without filing a complaint against the defendants in Maryland.

Months later, and after encountering diversity of citizenship problems in the federal proceedings, they belatedly initiated action in the Circuit for Washington County on August 16, 1988.

In respect to the state court proceedings, this court finds that there was substantial non-compliance with the statutory requirements. The compliance with this requirement is a condition precedent to vesting the state court with jurisdiction.

This court finds that the non-compliance was not simply an oversight or inadvertent failure to comply with a technical requirement. Rather, however, I find that the non-compliance was as a result of their decision to proceed in Federal Court, exclusively. The belated decision to file in the state court was made more than a year late and only after the plaintiffs encountered federal jurisdictional problems.

Dated: February 3, 1989

/s/ Daniel W. Moylan
Daniel W. Moylan
Associate Judge

# APPENDIX E

No. 87-1721

# United States Court of Appeals

Fourth Circuit

JANET L. ROWLAND; Donald E. Rowland
*Plaintiffs - Appellants*

v.

DONALD A. PATTERSON, M.D.;
Tom J. Altizer, M.D.;
Michael A. Winslow, M.D.
Robert K. Hobbs, M.D.
Robert J. Cirincione, M.D.
*Defendants-Appellees*

---

Argued March 10, 1988
Decided July 18, 1988
Rehearing Denied September 6, 1988

---

Before MURNAGHAN and CHAPMAN, Circuit Judges and McMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

MURNAGHAN, Circuit Judge:

On July 16, 1985, Janet L. Rowland and Donald Rowland filed with the Maryland Health Claims Arbitration Office (HCAO) a malpractice proceeding against five defendants who are medical doctors. The step was taken in accordance with the Maryland Health Care Malpractice Claims subtitle of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. Md. Cts. & Jud.Proc.Code Ann §§ 3-2A-01 to -09. That subtitle establishes as a pre-condition to legal action in court the institution of a medical malpractice proceeding. Md. Cts. & Jud.Proc.Code Ann §3-2A-02; *Davison v. Sinai Hosp. of*

*Baltimore*, 462 F.Supp. 778 (D.Md.1978), *aff'd*, 617 F.2d 361 (4th Cir.1980); *see Ott v. Kaiser-Georgetown Community Health Plan, Inc.*, 309 Md. 641, 646, 526 A.2d 46, 49 (1987).

Thereafter, following a summary judgment on May 6, 1987 by the HCAO for the defendants on the grounds that limitations had expired, plaintiffs filed a notice of rejection with the HCAO on June 12, 1987. Three days later, plaintiffs, alleging diversity jurisdiction, filed in the United States District Court for the District of Maryland a civil action to nullify the HCAO decision in favor of the defendants.[1]

Judicial review under a standard akin to *de novo* review of the HCAO decision was called for. Md. Cts. & Jud.Proc.Code Ann. § 3-2A-06. Review is not precisely *de novo* since the HCAO decision has continuing vitality. The court on preliminary motion may modify, correct or vacate the award if it was procured by fraud or misconduct, occasioned by prejudice, or if the HCAO had exceeded its authority or committed a mistake of law or fact appearing on the face of the award. Md.Cts. & Jud.Proc.Code Ann. §§ 3-2A-06(c), 3-223, 3-224. Otherwise, the award is admissible in any subsequent judicial proceeding and is presumed correct. Section 3-2A-06(d). Not only does the HCAO award have continuing vitality, but so do constituent elements of the proceeding. For example, when Donald Rowland's deposition in the HCAO proceeding was taken on December 15, 1986, it became admissible in the subsequent judicial proceeding. Section 3-2A-06(e).

On June 15, 1987 when the complaint was filed with the clerk of the Maryland federal district court, the plaintiffs and the defendants were diverse.[2] However, they were admittedly not diverse on July 16, 1985 when the HCAO proceeding first was filed.

---

[1] The nullification action which was accompanied by a Complaint was virtually identical with the medical negligence claim filed initially with HCAO.

[2] The defendants seek to controvert that fact, but in view of the result by the district court it never reached the issue. For reasons later appearing herein we need not and should not reach it either.

The question of controlling importance, of course, is which of those two filings: the HCAO filing or the filing of the complaint in federal court commenced the action for purposes of determining the existence of diversity jurisdiction. It is well settled that diversity is judged as of the time of commencement of suit. *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 6 L.Ed. 154 (1824); *Smith v. Sperling*, 354 U.S. 91, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957); *Mullins v. Beatrice Pocahontas Co.*, 489 F.2d 260 (4th Cir.1974). We must decide which filing commenced the suit. The district court ruled that the HCAO filing commenced it, found that on the date of commencement the parties were not diverse, and therefore dismissed the case for want of subject matter jurisdiction.

The district judge proceeded from the view that an action must commence for all purposes on a single date. He first found that the HCAO filing commenced the action for limitations purposes. He then stated that, because of a current disinclination to expand diversity jurisdiction, he should not hold that there was commencement of the action on two different occasions, once when the HCAO action was initiated on July 16, 1985, for limitation purposes, and again when the federal district court suit was filed on June 15, 1987 for purposes of determination of diversity.

There may be some doubts as to the correctness of the district court's logic. An action can commence on more than one date because of the holding in *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct.817, 82 L.ED. 1188 (1938). Federal courts sitting in diversity generally apply state statutes of limitations. *Ragan v. Merchants Transfer & Warehouse Co.n*, 337 U.S. 530 69 S.Ct. 1233, 93 L.Ed. 1520 (1949). Thus, a federal action may commence for limitations purposes upon whatever event the state has defined for that purpose, e.g., the date of service of the complaint. Yet for all other purposes the federal action will commence under the applicable Federal Rule of Civil Proce-

dure, Rule 3, that states that an action commences when the complaint is filed. However much it linguistically offends one's first impression, in legal principle, there could indeed be two different times of commencement.

However, even if the reasoning employed by the district court should prove to be slightly faulty, he was on the right track and the result remains the same. We agree with the conclusion that the present action commenced for purposes of determining diversity when the HCAO proceeding was filed. Federal courts apply federal rules of procedure, both those promulgated in the Federal Rules of Civil Procedure as well as wholly judge made procedural rules, unless the *Erie* doctrine commands otherwise. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); Ely, *The Irrepressible Myth of Erie*, 87 Harv.L.Rev. 693(1974). The present case requires us to decide which of two filings commenced an action in federal court for purposes of determining the existence of diversity jurisdiction. That is a purely federal procedural question, since no state substantive right is involved. *Hanna*, 380 U.S. at 471, 85 S.Ct. at 1143; 28 U.S.C. § 2072.

Looking at the situation solely from a federal point of view, what occurred on July 16, 1985, the bringing of the HCAO action, happened to amount for federal purposes to a commencement of the cause of action.[3] Two reasons lead us to that conclusion. One, the HCAO proceeding continued to have effect when and after the case took on a completely judicial aspect.

---

[3] The dissent suggests that *Cannon v. Kroger*, 832 F.2d 303 (4th Cir. 1987), *reh'g denied*, 837 F.2d 660 (4th Cir.1988), supports its result. To the extent that *Cannon* is relevant, it simply supports a proposition to which the majority and dissent agree, *viz*, that a federal procedural question is involved in the present case. The dissent states "[*Cannon*] lends support to the proposition that federal courts should apply the Federal Rules unless there is a compelling reason not to do so." We agree and have applied federal procedural law to the facts of the present case and have decided federally when the case "commenced" for purposes of determining diversity of the

Two, submission to the HCAO is a condition precedent to filing suit in federal court as well as to state court filing. The HCAO filing then is the first filing necessary to institute a federal civil action. We hold that the HCAO filing commenced the suit for purposes of determining diversity jurisdiction. At the time of filing the HCAO proceeding on July 16, 1985, there was no diversity.

Consequently, dismissal was, therefore, appropriate.

AFFIRMED.

McMILLAN, District Judge, dissenting:

The majority would hold that, for purposes of deciding diversity of citizenship of the parties, this action was "commenced" by the filing of a *claim* with a Maryland *state* administrative agency, rather than by "filing a *complaint* with the [federal] court," as required by Rule 3 of the Federal Rules of Civil Procedure.

I respectfully dissent.

This suit is a medical malpractice action by plaintiffs Janet Rowland and Donald Rowland against five medical doctors. Under *Maryland* statue, the Rowlands were required to file a *claim* with the Maryland Health Care Claims Arbitration Office as a precondition to filing a suit in either state or federal court. Md.Cts. & Jud.Proc.Code Ann. § 3-2A-02; *Davison v. Sinai Hospital of Baltimore,* 462 F.Supp. 778, 780 (D.Md.1978, *aff'd*, 617 F.2d 361 (4th Cir. 1980). The Health Care Claims Arbitration Office ("HCAO") is an *administrative agency* of the State of Maryland. It is not a state or federal *court.*

---

parties. That we measure diversity for that purpose by turning to an event occurring outside of a federal court makes ours no less a decision of federal procedural law for, in the same mannner *federal* procedural law requires, in cases removed from state court, that diversity exist at the time of commencement in state court as well as when the petition for removal is filed (*i.e.*, at a time when commencement could only be by pertinent *state* rules). *See 14A C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure*, § 3723, 311-14 (1985).

The Rowlands filed their claim with the Maryland HCAO on July 16, 1985. At the time they filed their claim, both the Rowlands and the defendants were residents of Maryland.

On May 6, 1987, the HCAO granted defendants' motion for summary judgment on the ground that the claim was untimely under the three-year statue of limitations applicable to medical malpractice claims against health care providers in Maryland. Md.Cts. & Jud.Proc. Code Ann. § 5-109.

On June 15, 1987, plaintiffs initiated this suit by filing their complaint in the United States District Court for the District of Maryland. Plaintiffs allege that they were residents of West Virginia at the time they filed their complaint in federal court. Although defendants dispute the fact of plaintiffs' West Virginia residence on June 15, 1987, the court below assumed it. We likewise assume that, for the purpose of deciding this appeal, the parties were of diverse citizenship on June 15, 1987.

The district court dismissed the suit on the basis that the suit commenced for diversity purposes on July 16, 1985, the date the claim was filed with the Maryland state agency (HCAO), rather than on June 15, 1987, the date plaintiffs filed their complaint in United States District Court. The district judge observed that the filing of the HCAO claim tolled the state statue of limitations. He dismissed the case because he concluded that there should not be two dates for commencement of suit, and because he was concerned not to "expand" diversity jurisdiction.

As the majority observes, this reasoning is not supported by the law. Federal courts sitting in diversity jurisdiction are bound to apply state law in determining what event tolls a state statue of limitations, notwithstanding the language of Fed.R.Civ.Proc.Rule 3. ("An action is commenced by filing a complaint with the court.") *Walker v. Armco Steel Corporation*, 446 U.S. 740, 751-752, 100 S.Ct. 1978, 1985-1986, 64 L.Ed.2d 659 (1980); *See, also, Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct.1233, 93 L.Ed. 1520

(1949). Where a state recognizes an event different from the filing of the complaint in the court as commencing the suit for the purpose of tolling a state statue of limitation, Rule 3 still governs the definition of "commencement of suit" for other purposes, such as time deadlines for responsive pleadings. *Walker*, 446 U.S. at 751-752, 100 S.Ct. at 1985-1986.

The majority also recognizes that the question when an action commences for the purpose of determining diversity is a matter of federal law. *See, Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir.1968); *See, also, Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir.1983) (following *Ziady*). However, the majority reaches a result that is *un*supported by federal law.

The circuit courts that have addressed the issue unanimously hold that, except in cases removed from state court, diversity of citizenship is determined with reference to the date on which a complaint is filed in federal court. *Topp v. CompAir Inc.* 814 F.2d 830,832, n. 1(1st Cir.1987) ("Citizenship, for purposes of establishing diversity jurisdiction, is determined as of the date of initiation of suit...[citations omitted]... Here, since suit was filed on August 30, 1985, the citizenship of CompAir Inc. will be determined as of that date"); *Lugo-Vina v. Pueblo International, Inc.* 574 F.2d 41, 42, n. 1 (1st Cir. 1978) ["Diversity] [j]urisdiction is to be determined *as of the time of the filing of the complaint.") Wigand v. Flo-Tek, Inc.* 609 F.2d 1028, 1032 (2nd Cir.1979) ("Diversity) jurisdiction is to be determined as of the commencement of suit. ... When the complaint in this case was filed on September 19, 1972, the offices and operations of Flo-Tek had been located in Hopewell Junction, N.Y. for approximately a year [footnote omitted]."); *Nationwide Mutual Fire Insurance Co. v. T & D Cottage Auto Parts and Service Inc.* 705 F2d 685, 688 (3rd Cir.1983) ("„ diversity jurisdiction is generally determined by the facts that existed at the time the complaint was filed."); *Mullins v. Beatrice Pocahontas Co.*, 489 F.2d 260, 261 (4th Cir.1974) ("Plaintiff's complaint was filed

on February 14, 1968, and that, of course, is the crucial date for determination of defendant's citizenship."); *Seafoam, Inc. v. Barrier Systems, Inc.* 830 F.2d 62, 66 (5th Cir. 1987) ("It is well established law that the jurisdiction of a federal court sitting in diversity is determined as of the time of the filing of the complaint."); *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.* 768 F.2d 189, 190 (7th Cir. 1985) ("...we direct the district judge to make and certify to us, within thirty days, his finding on the defendant's principal place of business is the relevant date for purposes of establishing federal [diversity] jurisdiction."); *Co-Efficient Energy Systems v. CSL Industries, Inc.* 812 F.2d 556, 557 (9th Cir.1987) ("Diversity of citizenship is determined as of the time of the filing of the complaint.") *Mann v. City of Tucson, Department of Police,* 782 F.2d 790, 794 (9th Cir. 1986) ("Existence of diversity jurisdiction is determined by the citizenship of the parties as the time of the filing of the complaints, not at the time the cause of action arose or after the action is commenced."). *Scoggins v. Pollock*, 727 F.2d 1025, 1028 (11th Cir. 1984) (Court determined diversity of citizenship by determining the facts as of the date the plaintiff filed the suite); *Prakash v. American University*, 727 F.2d 1174, 1179, n. 28 (D.C.Cir.1984) ("Diversity of citizenship must exist when the action is brought-here 1978-and not when the cause of action arose"); *Beghin-Say International v. Ole-Bendt Rasmussen*, 733 F.2d 1568, 1572 (Fed.Cir.1984) ("That determination [whether the parties had diversity of citizenship] must be made as of the filing date of a complaint, or of an amended complaint, and cannot be changed by action of a party thereafter.").

Those courts use the date the complaint is filed as the date of commencement of suit because they are bound to do so by Federal Rules of Civil Procedure Rule 3. Rule 3 states: "A civil action is commenced by *filing a complaint with the court.*" (Emphasis added.) The Advisory Committee's note to Rule 3 states,"...2. This rule governs the commencement of all actions,..."

Rule 3 has the force and effect of a federal statue. Courts have adopted a narrowing construction of the Federal Rules of Civil Procedure only where that construction serves the goals of the *Erie* doctrine, (preserving the integrity of state *substantive* law in diversity cases), or where an application of a rule would exceed the limits imposed by the Constitution or the Rules Enabling Act, 28 U.S.C. § 2072. *See*, *Walker*,446 U.S. at 751-752, 100 S.Ct. at 1985-1986. The application of the federal rules by a court sitting in diversity jurisdiction is not a matter of discretion.

> When a situation is covered by one of the Federal Rules, the questions facing the court is a far cry from the typical, relatively unguided *Erie* choice: *the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions* [footnote omitted]."

*Hanna v. Plumer,* 380 U.S. 460, 471, 85 S.Ct. 1136, 1144, 14 L.Ed. 2d 8 (1965) (Emphasis added).

Here, as noted above, there is no issue of conflict between federal and state law because the question when diversity is determined is a matter of federal law. Nor is there any contention that the application of Rule 3 to determine diversity of citizenship would violate the Constitution or the Rules Enabling Act.

The majority holds that the HCAO filing was the date of commencement of suit because "the HCAO proceeding continued to have effect when and after the case took on a completely judicial aspect," and "submission to the HCAO is a condition precedent to filing suit in federal court as well as state court." These observations may be accurate, but they provide no basis for disregarding the plain language of Rule 3.

The majority's holding is tinged with a further irony. The court could not exercise its subject matter jurisdiction at the time the HCAO claim was filed because exhaustion of the HCAO administrative process is a precondition of jurisdiction over a medical malpractice claim in Maryland. *Davison* 462 F.Supp. at 780-781. Yet, under the majority's view, this date is the appropriate time to which a court, *subsequent* to exhaustion of administrative remedies, looks back in order to determine if the parties are diverse. Thus, the majority would have a federal court determine its jurisdiction with reference to a time at which it could not have sustained its jurisdiction.

Because I respectfully believe the majority's reasoning and result to be unsupported by law, and because I believe federal courts should apply the language of the Federal Rules of Civil Procedure, absent a compelling reason for a narrowing construction I dissent.[1]

---

[1] Judge Hall has called attention to a prior decision by this court, *Cannon v. Kroger Co.*, 832 F.2d 303 (4th Cir.1987).

In *Cannon*, plaintiff asserted that her suit under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, was commenced for the purpose of tolling the six-month statute of limitations when, in compliance with North Carolina Rules of Civil Procedure Rule 3, a North Carolina court issued a summons in response to plaintiff's application to file a state court complaint.

A divided panel of the Fourth Circuit rejected that assertion. The majority held that the United States Supreme Court's decision in *West v. Conrail et al.*, 481 U.S. 35, 107 S.t. 1538, 95 L.Ed. 2d 32 (1987), mandated the application of the *Federal* Rules to determine when the limitation period applicable to claims under § 301 was tolled. The majority also held that the North Carolina *state* court *summons* was not the equivalent of a *Federal complaint* under Fed. R. Civ. P. Rule 8(a)(2), and that because a *complaint* within the meaning of Rule 8(a)(2) was not filed within the limitation period, the action was not commenced within that period under Fed. R. Civ. P. Rule 3.

Although the facts and reasoning of *Cannon* are not identical, the decision lends support to the proposition that federal courts should apply the Federal Rules unless there is a compelling reason not to do so.

# APPENDIX F

No. 87-1721

# United States Court of Appeals,

## Fourth Circuit

Janet L. ROWLAND; Donald E. ROWLAND,
*Plaintiffs-Appellants,*

v.

Donald A. PATTERSON, M.D.;
Tom J. Altizer, M.D.;
Michael A. Winslow, M.D.;
Robert K. Hobbs, M.D.;
Robert J. Cirincione, M.D.;
*Defendants-Appellees.*

---

Argued Feb. 7, 1989
Decided Aug. 10, 1989

---

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, AND WILKINS, Circuit Judges, en banc.

PHILLIPS, Circuit Judge:

Maryland law requires medical malpractice claimants to exhaust an arbitration remedy provided by the state as a precondition to bringing any civil action on the claim in state or federal court. The question on this appeal is whether when a rejected arbitration claim is followed by a federal action invoking diversity jurisdiction, diversity is determined by the parties' citizenship at the time the state arbitration claim was filed or at the time the federal diversity action was later commenced. We hold that

citizenship at the time the federal action was commenced by filing a complaint controls, and on that basis vacate the district court's contrary ruling and its resulting dismissal of this action for lack of diversity jurisdiction.

I

This action is one for medical malpractice brought by plaintiffs Janet Rowland and Donald Rowland against five medical doctors, the appellees on this appeal. Pursuant to Maryland law, the Rowlands were required to file a claim with the Maryland Health Care Claims Arbitration Office (HCAO) as a precondition to bringing a legal action for malpractice in either state or federal court. Md.Cts. & Jud.Proc.Code Ann. § 3-2A-02. HCAO is an administrative agency of the State of Maryland, not a court of law.

The Rowlands filed their claim with the Maryland HCAO on July 16, 1985. At the time they filed this claim, both the Rowlands and the defendants were citizens of Maryland

On May 6, 1987, the HCAO granted defendants' motion for summary judgment on the ground that the claim was untimely under the three-year statue of limitations applicable to medical malpractice claims against health care providers in Maryland. Md.Cts&Jud.Proc.Code Ann § 5-109.

On June 15, 1987, plaintiffs commenced this action by filing their complaint in the United States District Court for the District of Maryland, alleging that they were residents of West Virginia at the time they filed their complaint in federal court. Defendants disputed the plaintiffs' allegation that on June 15, 1987, they were citizens of West Virginia and argued alternatively that in any event the time for determining diversity was July 16, 1985, the date the claim was filed with HCAO.

The district court did not address the disputed issue of the plaintiffs' citizenship at the time their federal complaint was filed, but dismissed the action on the ground that for diversity

purposes the action was commenced on July 16, 1985, when the claim was filed with the HCAO, at which time the parties concededly were not of diverse citizenship. The district court observed that under the Maryland statute the filing of the HCAO claim tolled the state statue of limitations. Concluding that there should not be two dates for commencement of suit, and because of a concern not to "expand" diversity jurisdiction, the court dismissed the action.

This appeal followed.

## II

From the beginning of the diversity jurisdiction, the rule in actions commenced by plaintiffs in federal court has been that the citizenship of the parties at the time of commencement of the action determines whether the requisite diversity exists. *See Mollen v. Torrance,* 22 U.S. (9 Wheat.) 537, 6 L.Ed. 154 (1824):; *Conolly v. Taylor,* 27 U.S. (2 Pet.) 556, 7 L.Ed. 518 (1829). The rule is not derived from nor dependent upon interpretation of either the constitutional source of diversity jurisdiction in Art. III, § 2, or its statutory grant in 28 U.S.C. § 1331. Neither text expressly or by implication addresses this interstitial question. The rule is therefore purely a judicial one, announced and reiterated in the earliest Supreme Court cases as an *a priori* principle, apparently grounded simply in then customary judicial ways of looking at the attachment of jurisdiction and in the obvious necessity to have some clear rule on the matter. *See Mollern*, 22 U.S. at 539 (Marshal, C.J.) ("It is quite clear, that the jurisdiction of the court depends on the state of things at the time of the action brought...."); *Conolly*, 27 U.S. at 565 (Marshall, C.J.) ("[A] jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suite."). This is not the only rule that might validly (so far as any constitutional or statutory constraints are concerned) have been adopted to control on the point, but its reliability as a convenient bright-line mechanical

rule that is clearly compatible with general notions of the attachment of jurisdiction has assured its uninterrupted continuation from the beginning. *See generally* 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* & 3608 (1984) (hereinafter Wright, *Fed.Prac.*).

While over time there have been various ways in which a federal action could be "commenced,"[1] since 1938 civil actions are, per the civil rules, commenced by "filing a complaint with the court." Fed.R.Civ.P. 3. since the official Rule's adoption therefore, this public act of filing has fixed the time of commencement of federal civil actions, hence the convenient and reliable reference point for determining the existence of diversity under the broader, antecedent "time of commencement" rule.

We make these obvious points simply to indicate that the basic rule is one of federal interstitial common law, judicially created, grounded in policy and necessity rather than in any constitutional or statutory commands or constraints. And to make the further point that a routine application of the basic rule as now made act-specific by Rule 3 would require that diversity be determined as of the time the federal complaint in this action was filed rather than, as the district court held, the time that the earlier state arbitration claim was filed.

## III

The best way to address the jurisdictional issue here is by considering the arguments made by appellees for not applying the basic rule as now made act-specific by Rule 3. There are essentially two arguments as we understand the appellees' position. The first is that application of the federal time of commencement rule here "would violate well established principles of

[1] Until adoption of the federal rules in 1938, state law, per the Conformity Act, ch. 255, § 5, 17 Stat. 197 (1872), determined the specific acts, hence times, of commencement of federal actions at law. *See 1 Moore's Federal Practice* para. 3.03 (1989). The times were thus various, and specific applications of the time of commencement rule, comparably various.

Maryland's substantive law," hence, presumably, the principle of *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Appellees' Brief at 6.[2] The second, an alternative argument is that even if a federal rule fixing the time for determining diversity is applicable, the appropriate federal rule is that applied in removal cases, which looks to the time of commencement of any prior "action before a state tribunal." Appellees' Brief at 15.

We take these in order and also consider a third argument that may be implicit in appellees' position.

**A**

There is no *Erie* problem here. It is true that Maryland's statutory requirement of arbitration as a precondition to legal action has substantive aspects which, under *Erie*, must be honored by federal courts. Most critically, the precondition itself must be enforced by those courts. We have so held. *Davison v. Sinai Hosp. of Baltimore, Inc.*, 462 F.supp. 778 (D.Md.1978); *aff'd*, 617 F.2d 361 (4th Cir. 1980) (diversity action properly dismissed for failure to comply with precondition). Furthermore, the statutory provision that filing the arbitration claim tolls the applicable Maryland statute of limitations must be honored by federal courts under the settled principle that such state tolling provisions are effectively substantive for *Erie* purposes. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51, 100 S.Ct. 1978, 1985, 64 L.Ed.2d 656 (1980).

But that exhausts-at least for purposes of this case and the issues presented on this appeal-any *Erie*-protected elements of the state statute. The state law does not purport to fix the time for determining federal diversity jurisdiction-even assuming that it might constitutionally do so, a matter not before us. There is in consequence simply no question here of displacing any state

[2] The appellees do not invoke *Erie* by name, but their argument based upon the primacy of state substantive principles could only rest upon *Erie's* constitutional constraints.

rule of decision (of whatever nature) with the federal rule, hence there is no impediment under *Erie* to applying the federal rule. *Cf. Walker*, 446 U.S. at 751, 100 S.Ct. at 1985 ("Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.").

**B**

The alternative argument, that if federal law applies, it should be the federal rule for determining diversity in removed cases, is equally unavailing.

The removal rule *is* different, and in a way which, if applicable, would support the appellees' position. For it requires that to support diversity jurisdiction in removed cases, diversity must have existed both at the time the action was originally commenced in state court and at the time of filing the petition for removal. *See* 14A Wright, *Fed.Prac.*, § 3723, at 311-314 (1985).

The short and sufficient answer to this argument is twofold. First, technically this is not a removed case, originally commenced in a state court, but a federal case which originated in the federal system with the filing of a federal complaint. It is therefore one to which the federal time of commencement rule literally applies. Second, and more important, it does not have the features that gave rise to the different federal rule for removed cases. That rule apparently has been thought necessary to prevent nondiverse defendants in a state-filed action from acquiring a new domicile, removing on the basis of diversity, and thereby depriving plaintiffs of their forum of choice. *See id.* at 313-14. Here the parties who allegedly have brought about diversity are not defendants but the plaintiffs, so that a successful invocation of federal jurisdiction here will not have involuntarily deprived any party of any original rightful choice of forum. It is true that plaintiffs' conduct may have allowed them to "manufacture" a basis for jurisdiction that did not exist from the

accrual of their claim. But this is simply an accepted and necessary consequence of the basic right of plaintiffs so to "manufacture" a *bona fide* diversity jurisdiction. *See generally* 13B Wright, *Fed.Prac.* § 3608, at 450-51.

Neither the form nor the underlying rationale for the federal removal rule requires its application here.

C

In the end, the only possible argument for not applying here the federal time of commencement rule is one of policy. Though, as indicated, appellees seemingly have confined their position to contending that *Erie* considerations forbid application of the rule, or that the removal rule analogy somehow compels it, we think it appropriate to address this last possibility as well. We do so for two reasons: first, it may be implicit in appellees' formal arguments which, as indicated, were not altogether clear as to their conceptual bases; second, it was the basis for the vacated panel majority opinion in this case. 852 F.2d 108, 110-11 (4th Cir.1988).

Under this theory, cases of this type presumably would be treated as special cases requiring special treatment. Though not controlled either by state substantive rules or by the federal removal rule, neither should they be controlled by Rule 3's fixing of the "time of commencement" as the time of filing a federal complaint. Presumably, the special nature of such cases would be that state law has imposed some substantively enforceable precondition to maintaining a legal action upon a particular claim. In such cases, it could be contended, the federal rule for determining diversity should, as a matter of policy, be by reference to the act commencing compliance with the precondition rather than the act of filing a later federal complaint.

Assuming that such a policy choice were possible for us in the face of Rule 3-a matter of obvious doubtfulness that we need not decide-we would not make that choice generally, and

specifically decline to make it in this case. It would not be a good policy for general application in "precondition" cases. Certainly it would not be as good a policy as continuing to adhere to the basic rule in such cases, for two reasons.

First, the basic rule insures greater certitude in making the jurisdictional determination at issue. It provides a uniform reference point in the form of a readily identifiable act of public record, uniformly recorded throughout the federal system. By contrast, reference to the many acts that might be deemed to "commence" compliance with the variety of present and future state preconditions to suit would be fraught with obvious uncertainties and administrative difficulties.[3]

---

[3] Though state prelitigation procedures are not, of course, confined to medical malpractice claims, the state medical malpractice procedures presently in place provide an apt illustration of the difficulties and uncertainties that the proposed rule would produce. There are presently in effect a number of state procedures generally comparable in the critical respect to Maryland's. While they vary greatly in detail, all require acts, some multiple acts, of one kind or another that could be contended to be the "commencement" of the preliminary proceeding, hence, under the theory under discussion, the "commencement" of any ensuing legal action. *See, e.g.*, Fla.Stat.Ann §§ 768.041 *et seq.* (1986) (claimant required by § 768.57 "[p]rior to filing a claim...[to] serve upon each prospective defendant...a notice of intent to initiate litigation...."). Hawaii Rev.Stats.Ann. §§ 671-11 *et seq.* (1988) (claimant required by § 671-12 to "submit the claim to the medical claim review panel before a suit based on the claim may be commenced in any court of this State"): Idaho Code Ann. §§ 6-1001 *et seq.* (1979) (claimant required by § 6-1007 to serve "a true copy of the claim" at the "commencement" of compulsory proceedings for prelitigation consideration); La.Rev.State.Ann. § 40:1299.47 *et seq.* (Supp.1989) (per § 1299.47(B)(1)(a)(i), "No action...may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel..."); Mont.Code Ann. § 27-6-101 *et seq.* (1987) (per § 27-6-301), "Claimants shall submit a case for consideration of the [medical legal panel] prior to filing a complaint in any ...court...by addressing an application...to the director of the panel."); N.H.Rev.Stat.Ann §§ 519-A:1 *et seq.* (1974) (per § 519-A:2, claims may be voluntarily submitted to hearing panel "prior to institution of any litigation [by] fil[ling] initially with the clerk of court...;

Second, there is nothing to choose between the two rules in terms of the relative fairness of their applications over time. The disadvantage presumably thought to result to the defendants in this case from application of the basic rule is that it may permit plaintiffs to "manufacture" a basis for federal jurisdiction that would not exist were defendants' proposed rule adopted. The basic rule obviously may have that effect in this case, but the defendants proposed rule would not protect future defendants from the same result. The very occasional plaintiff minded to "manufacture" diversity jurisdiction by going to the trouble of changing domicile would be as able to do so under defendants' proposed rule as under the basic rule.[4]

---

New Mex.Stat.Ann §§ 41-5-1 *et seq.* (1978) (per § 41-5-15, "No malpractice action may be filed in any court...before application is made to the medical review commission...."). Pa.Code T. 37 §§ 171.1 *et seq.* (1989) (per § 171.23, An action may be commenced [before an arbitration panel] by the filing of [a] fee...and a notice complaint or complaint with the Administrator...in person or by certified mail..."); 9 Utah Code Ann. §§ 78-14-1 *et seq.* 1987) (per § 78-14-12) prelitigation consideration of ...claims...condition precedent to commencing litigation"; "party initiating ...shall file a request...with [state agency] within 60 days after the filing of a statutory notice of intent to commence action..."); Va.Code Ann. §§ 8.01-581.2, claimant must "notify" putative defendant of claim by mail "prior to commencing" an action, where-upon either claimant or potential defendant may then "request" medical panel review by mailing request to Chief Justice); Wis.Stat.Ann. §§ 655.42 *et seq.* (Supp.1988) (per § 655.44, request for mediation a precondition to court action; "shall be delivered in person or sent by registered mail to the director"); Wyo.Stat. §§ 9-2-1501 *et seq.* (1987) (per § 9-2-1506, review by medical review panel precondition to legal action; instituted by "application" to panel director).

These statutes sufficiently illustrate the difficulty and uncertainty that would result from rejection of the nationally uniform rule based on Rule 3 in order to accommodate this sort of state precondition to legal action.

[4] No rule except one that fixed diversity as of the time at the latest that a cause of action accrued could protect putative defendants against this inevitable consequence of the basic right of a plaintiff originally to choose both the forum and the timing of an action. unworkability of any such rule is obvious and is not suggested here. *See* 13B Wright, *Fed.Prac.* § 3608, at 452.

In terms of their essential fairness in this respect, the two rules are therefore a standoff. Under the circumstances, stability and certainty of application dictate adhering to the well-settled, known rule, and so we choose, assuming that we have any choice in the face of Rule 3.

## IV

For these reasons we hold that the district court erred in dismissing the action because the parties were not of diverse citizenship at the time the state arbitration claim was filed. The appropriate rule for application here is that the existence of diversity should be determined by reference to the time the federal complaint was filed. Accordingly, we vacate and remand the action for further proceedings consistent with this opinion.[5]

SO ORDERED.

---

[5] By this holding we do not of course purport to decide the jurisdictional issue raised by defendants' alternative objection that plaintiffs were not of diverse citizenship at the time the federal complaint was filed. That issue presumably remains for resolution by the district court under the proper time of commencement rule.

# APPENDIX G

**CIVIL ACTION NO. R-87-1560**

IN THE

# United States District Court

## FOR THE DISTRICT OF MARYLAND

JANET L. ROWLAND AND DONALD E. ROWLAND
*Plaintiffs*

v.

DONALD A. PATTERSON, M.D., ET AL.
*Defendants*

## MEMORANDUM AND ORDER

Before the Court is defendants Patterson's, Altizer's, Winslow's, and Hobbs' motion to dismiss. The motion has been fully briefed and responded to and the Court now rules without need for a hearing, pursuant to Local Rule 6(G) (D. Md. 1987).

Defendants allege that his Court lacks subject matter jurisdiction because at the commencement of this action diversity did not exist between the plaintiffs and the defendants, and that the subsequent move of the plaintiffs to West Virginia cannot establish diversity. The Court agrees and will grant defendants' motion to dismiss.

Plaintiffs contend that this action commenced with the filing of the complaint with this Court on June 15, 1987. Defendants, on the other hand , claim that this action was commenced by the filing of the suit with the Health Claims Arbitration Office (HCAO) on July 16, 1985. At that time, both plaintiffs and defendants were residents of the State of Maryland, and no diversity existed.

It is well established that the existence of diversity is determined at the commencement of the action. *See Mollan v. Torrance*, 22 U.S. (9 Wheat) 154 (1824). Plaintiffs argue that the action before the HCAO was a separate and distinct action from this filing, and that, for purposes of diversity, commencement began on June 15, 1987.

Plaintiffs have cited several cases dealing with diversity, but none establish their contention that this action did not commence with the HCAO filing. Furthermore, plaintiffs contend that, for purposes of tolling the statute of limitations, this suit was commenced on July 16, 1985, with the filing of the HCAO suit. Plaintiffs have espoused a novel but unpersuasive argument to explain this disparity. It is illogical and unreasonable for an action to "commence" on two separate dates.

When, as here, the legislature has provided for an administrative remedy which tolls the statute of limitations, this Court finds that commencement of the administrative remedy also serves to institute proceedings for purposes of determining diversity jurisdiction.

Because no diversity existed when this suit was commenced on July 16, 1985, this Court lacks subject matter jurisdiction over the case. It is therefore unnecessary to address the issue of the plaintiffs' present citizenship.

Historically, diversity jurisdiction was created to provide a neutral forum for fear that prejudice existed in state courts, but this argument loses much of its force in today's society. See *Wasson v. Northrup World Wide Aircraft Serv., Inc.*, 443 F. Supp. 400, 401, (D.C. Tex. 1978). "It seems highly unlikely that this type of prejudice exists in much quantity today." *Asher v. Pacific Power & Light Co.*, 249 F. Supp. 671, 674 (D.C. Cal. 1965). Given the disfavor in which diversity is held, accepting plaintiffs' argument would create an unwarranted expansion of diversity jurisdiction. The proper forum for this case is in the state court system.

It appears from the pleadings that defendant Robert J. Cirincione, M.D., did not join in the motion to dismiss. Because the Court finds it lacks subject matter jurisdiction, there is no good reason to keep the case open as to him. Therefore, the motion to dismiss will be granted for the case as a whole and not just the named movants.

Accordingly, for the reasons stated herein, it is this 5th day of October, 1987, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motion to dismiss is GRANTED WITHOUT PREJUDICE to plaintiffs' right to refile in state court; and,

2. That the Clerk of the Court shall mail copies of the Memorandum and Order to all counsel of record.

/s/ Norman P. Ramsey
Norman P. Ramsey
United States District Judge

# APPENDIX H

No. 90-1074

# United States Court Of Appeals

FOR THE FOURTH CIRCUIT

FILED September 9, 1991

JANET L. ROWLAND;
DONALD E. ROWLAND
*Plaintiffs - Appellants*

v.

DONALD A. PATTERSON, M.D.;
TOM J. ALTIZER, M.D.;
MICHAEL A. WINSLOW, M.D.;
ROBERT K. HOBBS, M.D.;
ROBERT J. CIRINCIONE,M.D.
*Defendants - Appellees*

**On Petition for Rehearing with Suggestion for Rehearing In Banc**

Appellants' filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Phillips, with the concurrence of Judge Murnaghan and Judge Britt.

For the Court,

/s/John M. Greacen
Clerk